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8 **IN THE UNITED STATES DISTRICT COURT**
9 **FOR THE EASTERN DISTRICT OF CALIFORNIA**
10

11 UNITED STATES OF AMERICA,

No. CR S-02-0151-MCE-CMK
CIV S-07-0247-MCE-CMK

12 Respondent,

13 vs.

FINDINGS AND RECOMMENDATIONS

14 SCOTT MICHAEL VOGELSANG,

15 Movant.
16 _____/

17 Movant, a federal prisoner proceeding pro se, brings this motion to correct or set
18 aside a criminal judgment pursuant to 28 U.S.C. § 2255 (Doc. 194). Movant submitted a
19 separate memorandum in support of his motion (Doc. 241, filed under seal).¹ Movant has also
20 submitted other documents apparently in support of his motion (See Docs. 212, 213, 228).
21 Further, movant seeks leave to conduct formal discovery (Doc. 195). Respondent has filed an
22 opposition to the underlying § 2255 motion as well as the request for leave to conduct discovery
23 (Doc. 223), and movant has filed a reply (Doc. 229).²
24 _____

25 ¹ Movant requested that his memorandum in support of his § 2255 motion be filed
under seal (See Docs. 202, 207, and 239). By separate order, that request was granted.

26 ² This document is also filed under seal pursuant to separate court order.

I. BACKGROUND

A. Facts

In its opposition, respondent sets forth the factual background for this case, which the court finds to be accurate based on the record. Specifically, respondent outlines the following general facts:

Medicare is the federal health insurance program for people who are over 65, disabled, or have end-stage renal disease. R.T. 126:2-4. Part A of the program, not relevant here, covers inpatient hospital care, skilled nursing care, and some home health and hospice care. R.T. 126:8-11. Part B is a supplemental insurance program that covers outpatient services including durable medical equipment (“DME”). R.T. 126:11-15. Wheelchairs and motorized scooters are considered DME. R.T. 126:25-127:3. Medicare pays only 80% of the allowed cost of DME with the beneficiary being responsible for the remaining 20%. R.T. 127:6-11.

Medicaid is a different federal health insurance program for people with low incomes. R.T. 127:13-15. Medi-Cal is the Medicaid program for California. R.T. 127:13-15. It is administered jointly by the federal government and the State of California. R.T. 149:11-13. If a patient is eligible for Medi-Cal, it pays the 20% patient portion that Medicare does not pay. R.T. 127:16-20.

Becoming a provider is voluntary and a business can stop being a Medicare or Medi-Cal provider at any time. R.T. 211:15-217:7. Both Medicare and Medi-Cal give each provider an instruction manual, periodic notices of changes in their rules, and access to telephone services they can call to get any questions answered. R.T. 137:19-139:6; 212-213. Petitioner’s company, Specs Rehab, Inc. (“Specs”), was a Medicare and Medi-Cal provider. R.T. 139, 213-214. As a provider, it was supposed to submit Medi-Cal claims to EDS, a company that processed claims for Medi-Cal. R.T. 214:19-24.

Medicare patients cannot simply ask for an item like a wheelchair. R.T. 128:4-10. A physician must first certify that the equipment the patient wants is reasonable and necessary as part of a plan of treatment. R.T. 128:12-17. Once the patient gets this prescription, she can take it to a DME supplier like Specs. The supplier is required to do an insurance check to find out who is primarily responsible for payment. R.T. 129:8-14. If Medicare is the primary payer, the supplier bills Medicare which pays the supplier 80% of the charges that Medicare considers reasonable for the equipment. R.T. 129:8-18. When Medicare pays a claim for a Medi-Cal beneficiary, it automatically sends a “crossover” bill to Medi-Cal for the remaining 20%. R.T. 215:17-21.

If Medicare denies payment, the supplier can bill Medi-Cal for the entire 100% of the cost, up to the Medi-Cal maximum. R.T. 129:25-130:2; 215:22-25. In this situation, a Medi-Cal supplier like the petitioner must first get an Explanation of Medicare Benefits (“EOMB”) from Medicare showing that it is denying the claims. R.T. 216:1-4. He then sends this to Medi-Cal to show that Medicare will not pay the bill. R.T.

216:1-19. Medi-Cal will then pay the complete 100% if it is an item that Medi-Cal covers. R.T. 215:22-25. Medi-Cal is a payer of last resort and so should only be billed if all other available sources of insurance have been exhausted, including Medicare. R.T. 130:3-7.

Sometimes Medicare will reconsider a payment denial and agree to pay its 80% after Medi-Cal has already paid 100% of the claims. In this situation, the provider has been paid twice and is required to return the overpayment to Medi-Cal. R.T. 130:11-16; 235:10-236:8. The provider can either return the original Medi-Cal check or send Medi-Cal a new check. R.T. 236:3-8. The provider can also simply send Medi-Cal a Claim Inquiry Form ("CIF") explaining that it has received an overpayment. R.T. 235:25-236:5. Medi-Cal will then deduct the overpayment from its payment to the provider. R.T. 236:20-237:2. If necessary, Medi-Cal can withhold money to correct an overpayment even if it learns . . . of it independently and the provider never notifies Medi-Cal. R.T. 237:3-18.

As to the crimes in this case, respondent states that movant "took advantage of the potential for overpayments inherent in the system to commit fraud." Respondent states this fraud took two forms: "scooter swaps" and "double billing."

1. Scooter Swaps

As to the scooter swaps, movant fraudulently substituted motorized scooters for power wheelchairs. A power wheelchair is only available for patients who need wheelchairs but do not have sufficient upper-body strength to operate one with their arms. If a patient does not have enough upper-body strength to operate a regular wheelchair, but does have enough strength to sit upright and maintain stability, a motorized scooter can be used instead. Only certain specialists can prescribe scooters instead of power wheelchairs. A DME provider cannot make the decision to substitute one for the other. Further, if the DME provider does make such a substitution, and the substituted item delivered by the provider later needs repairs, neither Medicare nor Medi-Cal will pay because the original prescription did not allow for that item.

Respondent states this system is ripe for fraud because scooters cost far less than power wheelchairs. For example, a DME provider could convince a patient with a power wheelchair prescription that a scooter would serve their needs just as well, even though a specialist had not made that determination. The provider could then submit a claim for the cost

1 of a power wheelchair, deliver the scooter, and pocket the difference with nobody knowing. This
2 is the fraud committed by movant.

3 2. Double Billing

4 Respondent states that movant engaged in two forms of double billing fraud. In
5 the first method, movant would submit a claim for 80% to Medicare knowing that it would be
6 denied because he intentionally included errors on the form. When it was denied, he would then
7 send a claim for 100% to Medi-Cal based on the Medicare denial. At the same time, he would
8 appeal the Medicare denial by correcting his original errors. In the meantime, he would receive
9 the 100% payment from Medi-Cal. After the Medicare appeal was granted, he would then
10 submit 80%/20% bills to Medicare and Medi-Cal in the normal course, resulting in double
11 payment for the same item. In the second method of double billing fraud, movant would submit
12 a proper 80%/20% claim to both Medicare and Medi-Cal and be paid. He would then submit a
13 100% claim to Medi-Cal as if the Medicare claim had been denied.

14 **B. Procedural History**

15 Movant was charged in a 23-count second superseding felony indictment filed
16 with 22 counts of health care fraud and one count of witness tampering. Movant was found
17 guilty following a jury trial on all counts except the witness tampering count and was sentenced
18 to concurrent 33-month sentences on each count, plus \$168,577.84 in restitution and a penalty
19 assessment of \$2,200.00. In an unpublished memorandum disposition, the Ninth Circuit Court of
20 Appeals affirmed the conviction and sentence. The Ninth Circuit's decision, in its entirety, is as
21 follows:

22 Scott Vogelsang appeals his conviction on 22 counts of health care
23 fraud in violation of 18 U.S.C. § 1347. He challenges the conviction on
24 the ground that the district court abused its discretion in excluding
25 testimony that Vogelsang characterized as evidence of third party
26 culpability. The district court excluded the evidence for lack of sufficient
probative value, and we agree. The evidence dealt with misconduct on the
part of a supervisor in the claims processing office, but with respect to the
handling of claims other than those submitted by Vogelsang. It is not
evidence even suggesting that the supervisor could be guilty of the crimes

1 with which Vogelsang was charged.

2 Vogelsang also challenges his sentence on the ground that the
 3 district court should have conducted an evidentiary hearing to determine
 4 the amount of loss caused by the fraud. The government introduced
 5 testimony calculating the amounts that Vogelsang had double billed.
 6 Vogelsang did not submit or proffer any evidence that the loss should be
 7 calculated differently. The amount was not reasonably in dispute so as to
 8 give rise to the need for any evidentiary hearing. See U.S.S.G. § 6A1.3(a).
 9 AFFIRMED.

10 II. DISCUSSION

11 Movant argues that relief is warranted due to a number of alleged errors which
 12 occurred during the trial, as well as ineffective assistance of counsel. It is somewhat difficult to
 13 discern exactly what movant is claiming. In his initial § 2255 motion (Doc. 194), movant lists
 14 four separate claims, as follows:

15 Ground One – Ineffective Assistance of Counsel, Pre Trial

16 Counsel was held in Contempt of Court which biased counsel's
 17 ability to present the case properly. Combined with the judge's rulings,
 18 counsel's angry reaction to rulings, and the visible manifestation of the
 19 critical deterioration in the lawyer's relationship with the judge resulted in
 20 a fragmented and disjointed defense. Counsel failed to obtain Medi-Cal
 21 RAD's that showed adjustments and what proper payments should have
 22 been, failed to obtain Medicare documents, failed to retain expert
 23 witnesses in Medicare and Medi-Cal dually eligible reimbursement issues.
 24 Doing so, after saying "ready for trial" would have further delayed
 25 proceedings and counsel would have been held in contempt again and this
 26 time it would have stuck.

Ground Two – Ineffective Assistance of Counsel, At Trial

20 Counsel erred in failing to notice that the prosecution's exhibits
 21 had been tampered with on several occasions and failed to obtain
 22 certification of custody of exhibits. Counsel failed to research alleged
 23 "60-Day" law under Title 42 Subpart-D, that was misquoted with the
 24 intent to change the meaning of the law, failed to create a Time Line of
 25 events compared to alleged dates of events by prosecution's witnesses
 26 whom would have been impeached by a Time Line chart had one been
 created, and failed to present or attack false evidence presented in
 prosecution exhibit 11 "summaries" and a plethora of other false hearsay
 evidence presented by the prosecution's witnesses.

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Ground Three – Ineffective Assistance of Counsel, Simple Error

Failed to even consider a valid defense theory. “Mistakes” theory conflicts with tampered and altered evidence regardless of its origin. Counsel refused to investigate other defense theories; failed to obtain or explain accomplice instructions for Zine and Bennett and failed to subpoena Martha Edwards who was a Grand Jury witness who was embezzling and had filed bankruptcy fraudulently before trial.

Ground Four – Due Process Violation, Prosecutorial Misconduct

Conviction obtained by unconstitutional failure of prosecution to disclose to the defendant evidence favorable to the defendant and presented tampered evidence and false testimony in order to obtain a conviction.

Multiple different versions of prosecution exhibits 5, 6, and 11 were presented to the defense and the source of those exhibits had been misrepresented pre-trial. Title 42, Subpart-D, was misquoted as was the Medicare provider manual and numerous Medicare rules and regulations. The net effect changes the intent of Medicare and Medicaid law. Prosecution could have and should have known laws he was presenting were false. Prosecution withheld Medicare and Medi-Cal payment record and claims – all which would have shown the alleged scheme’s WAYS AND MEANS were not illegal, but in fact required under federal law. The prosecution either suborned perjury or went to trial with false facts and failed to research the laws and regulations and therefore prosecuted on false testimony and evidence. Some exculpatory evidence was released by the prosecution, or his agent(s), post trial.

In his § 2255 motion, movant also states that there was “lack of jurisdiction for counts 1-22.”

After he filed his § 2255 motion, movant submitted documents entitled: “Claim for Relief and Dismissal of Count 23 on Grounds of Double-Jeopardy” (Doc. 212) and “Claim for Relief and Motion to Vacate Counts 1 and 3-22 For Lack of Jurisdiction” (Doc. 213). He also submitted a traverse (Doc. 229). In the first document, movant argues:

The movant addressed the issue of billing for services rendered for the repair of a scooter which was subsequently billed to Medicare. Medicare did not pay for the original purchase of said scooter. The government at trial alleged that the billing of said repair was fraud and obtained a conviction based [sic] on false statements of government witnesses at trial. The government has yet to produce law, rules or regulations supporting their claim of fraud. Federal law states that billing is mandatory and a misdemeanor if not billed. (emphasis in original).

Count 23 cannot be both a crime to bill and a crime to not bill at the same time.

1 ENTITLEMENT TO RELIEF

2 In part 12-D [Ground Four] of the movant's motion . . . for
3 Vacating of Sentence the movant addressed the specific misconduct of the
4 prosecution in suborning perjury and falsely quoting the law. This is, in
5 part, in regards to billing Medicare for medical equipment repairs where
6 the equipment was not purchased by Medicare. Billing Medicare for any
7 health care related service is covered by 42 C.F.R. § 405.207, the Social
8 Security Act . . . , the Medicare Carrier Manual . . . , and the Medicare
9 Provider Manual published by CIGNA Medicare, the carrier with the
10 authority to determine what payments, if any, should be for services.

11 The movant and defendant addressed this in greater detail in his
12 affidavit in support of his § 2255 motion and is further supported by the
13 affidavit & memorandum Exhibit G.³

14 The government's indictment item "H" has no basis in law, rule, or
15 regulation. This is clear misconduct by the former prosecutor.

16 In the second document, movant states:

17 FALSE GROUNDS FOR JURISDICTION

18 These counts for which the federal government's attorney alleged
19 fraud for alleged "double-billing and receiving double payment" is not
20 within the jurisdiction of the federal courts. The government unlawfully
21 assumed grounds for jurisdiction. . . .

22 ENTITLED TO RELIEF

23 In part 12-d [Ground Four] of movant's motion . . . the movant
24 addressed the specific misconduct of the prosecution in suborning perjury
25 and falsely quoting the law.

26 The movant and defendant addressed this in greater detail in his
27 affidavit in support of his § 2255 motion and is further supported by the
28 affidavit & memorandum's Exhibits D, E, X and others.

29 The government's indictment items "II THE SCHEME" and "A"
30 have no basis in law, rule or regulation. This is further misconduct by the
31 former prosecutor. . . .

32 In his traverse, movant argues prosecutorial misconduct and ineffective assistance of counsel
33 consistent with his prior submissions. He also, for the first time, alleges various instances of trial
34 court error. Movant outlines the following categories of claims in his traverse:

35 Prosecutorial Misconduct

- 36 - Misrepresentation of Regulations
- 37 - Conclusions of Law
- 38 - Allowables and Payments
- 39 - Exhibit Errors and Forgeries
- 40 - Suborned Perjury
- 41 - Closing Argument

42 ³ Movant apparently refers to the memorandum filed in support of his § 2255
43 motion, and documents attached thereto (Doc. 241, filed under seal).

1 - Obstruction of Discovery

2 Trial Errors

- 3 - Administrative Remedies Required but Denied
- 4 - Explanation Withheld from Jury
- 5 - Ashley Gun Factor
- 6 - Jean Stone was not an Expert
- 7 - Misstatements of Law
- 8 - Conflicting Testimony and Procedural Errors

9 Ineffective Assistance of Counsel

- 10 - Conflict of Interest
- 11 - Failed Investigation and Discovery
- 12 - Failed Alibi Defense
- 13 - Failure to Enter Evidence
- 14 - Failure to Attack Government Evidence
- 15 - Failure to Know Regulations and Challenge Government Errors
- 16 - Failure to Challenge Sentencing Enhancement
- 17 - Failure to Communicate and Present Appeal Issues

18 Movant also asserts in various filings that he is entitled to leave to conduct formal discovery.

19 Respondent opposes, arguing that movant procedurally defaulted on his claims of
20 prosecutorial misconduct and trial errors because they should have been litigated on direct
21 appeal. Respondent also argues that movant's ineffective assistance of counsel claims lack merit.
22 As to procedural default, movant argues: (1) ineffective assistance of counsel constitutes cause
23 and prejudice; and (2) actual innocence excuses the default.

24 **A. Ineffective Assistance of Counsel Claims**

25 The Sixth Amendment guarantees the effective assistance of counsel. The United
26 States Supreme Court set forth the test for demonstrating ineffective assistance of counsel in
Strickland v. Washington, 466 U.S. 668 (1984). First, movant must show that, considering all
the circumstances, counsel's performance fell below an objective standard of reasonableness.
See id. at 688. To this end, movant must identify the acts or omissions that are alleged not to
have been the result of reasonable professional judgment. See id. at 690. The federal court must
then determine whether, in light of all the circumstances, the identified acts or omissions were
outside the wide range of professional competent assistance. See id. In making this
determination, however, there is a strong presumption "that counsel's conduct was within the

1 wide range of reasonable assistance, and that he exercised acceptable professional judgment in all
 2 significant decisions made.” Hughes v. Borg, 898 F.2d 695, 702 (9th Cir. 1990) (citing
 3 Strickland, 466 U.S. at 689).

4 Second, movant must affirmatively prove prejudice. See Strickland, 466 U.S. at
 5 693. Prejudice is found where “there is a reasonable probability that, but for counsel’s
 6 unprofessional errors, the result of the proceeding would have been different.” Id. at 694. A
 7 reasonable probability is “a probability sufficient to undermine confidence in the outcome.” Id.;
 8 see also Laboa v. Calderon, 224 F.3d 972, 981 (9th Cir. 2000). A reviewing court “need not
 9 determine whether counsel’s performance was deficient before examining the prejudice suffered
 10 by the defendant as a result of the alleged deficiencies . . . If it is easier to dispose of an
 11 ineffectiveness claim on the ground of lack of sufficient prejudice . . . that course should be
 12 followed.” Pizzuto v. Arave, 280 F.3d 949, 955 (9th Cir. 2002) (quoting Strickland, 466 U.S. at
 13 697).

14 As set forth in the § 2255 motion, movant claims ineffective assistance of counsel
 15 on the following bases:

- | | |
|-------------------|---|
| 16 “Pre Trial” | - Failure to obtain Medi-Cal “RADs”
- Failure to obtain Medicare documents
- Failure to retain experts |
| 18 “At Trial” | - Failure to notice tampering of exhibits
- Failure to obtain certification of custody of exhibits
- Failure to research
- Failure to create timeline
- Failure to attack government evidence
- Failure to present financial records |
| 21 “Simple Error” | - Failure to present “mistakes” defense theory
- Failure to obtain accomplice instruction
- Failure to subpoena Martha Edwards |

24 Movant was represented at trial by Mark Reichel and Victor Haltom. Mr. Haltom also
 25 represented movant on appeal. Petitioner has stated that his “main issue” in this case is
 26 ineffective assistance from Mr. Haltom (See Doc. 186, p. 1).

1 Before addressing these specific claims, the court observes that the district judge
2 made a specific comment regarding defense counsel's assistance. In particular, the district judge
3 stated:

4 Mr. Haltom has done everything he possibly can, in my opinion, to
5 try and represent [movant] in a zealous and appropriate manner. Quite
6 frankly, . . . you can't make a silk purse out of a sow's ear. . . .

7 The record reveals that, among numerous other efforts, defense counsel did the following on
8 movant's behalf: (1) filed a pre-trial motion to dismiss, which resulted in a superceding
9 indictment charging a reduced total amount of loss; (2) filed motions for a new trial;
10 (3) presented 13 defense witnesses; (4) engaged in vigorous cross-examination of prosecution
11 witnesses; (5) appealed the court's ruling on amount of loss; (6) appealed the court's ruling on
12 exclusion of witness Hilda Robles; (7) secured an acquittal on the charge of witness tampering;
13 and (8) filed numerous sentencing memoranda.

14 1. Failure to Obtain Medi-Cal "RADs"

15 The court has reviewed the § 2255 motion and the 60-page memorandum filed in
16 support thereof and agrees with respondent that any ". . . assertion that exculpatory RADs
17 [Remittance Advice Details] exist is vague and unsupported, and the documents are not
18 identified with any specificity." As respondent notes, these documents would have been in
19 movant's possession because they were issued to movant while he conducted business. Thus,
20 movant should be able to identify which RADs should have been, but were not, introduced by
21 counsel and how they would have affected the outcome of the trial. Movant has failed to do so.

22 2. Failure to Obtain Medicare Documents

23 Movant asserts that counsel failed to obtain Medicare claims documents and that
24 the prosecutor failed to turn over such documents. The court agrees with respondent's argument
25 that the record belies this claim:

26 Petitioner's counsel filed a motion for discovery which attached as
an exhibit a memorandum from the government's case agent stating that
electronic copies of Medicare and Medi-Cal claims were available.

1 Docket, #48, Ex. A. In the reply in support of that motion, petitioner's
2 counsel acknowledged that he had received, among other things an
3 "electronic copy of Medicare and Medi-Cal claims." Docket, #52 at 1.
4 Indeed, the discs containing this claim information were received into
5 evidence as trial exhibits. R.T. 325:16-326:17; Government's Exhibits 9,
6 10.

7 Movant has not identified any specific documents which should have been, but were not,
8 introduced by counsel or withheld by the government.

9 3. Failure to Retain Experts

10 Movant alleges that counsel was ineffective for failing to obtain "Medicare and
11 Medi-Cal dually eligible reimbursement" experts and accounting experts. He asserts that counsel
12 "lacked the education and experience necessary to make determinations without advice from
13 experts." As to an accounting expert, the record reflects that counsel did in fact seek such an
14 expert to testify at an evidentiary hearing, but that the request was denied by the court. The
15 denial of the evidentiary hearing was upheld by the Ninth Circuit on direct appeal. As to experts
16 in "dually eligible reimbursements," movant does not state how such experts would have affected
17 the trial.

18 4. Failure to Notice Tampering of Exhibits

19 In Ground Two of his § 2255 motion, movant claims that counsel was ineffective
20 for "failing to notice that the prosecution's exhibits had been tampered with on several
21 occasions." It appears that this claim relates to movant's allegation at trial that two government
22 exhibits – Exhibits 5 and 6 – were forgeries. However, as respondent notes, movant testified that
23 his signature was on both these documents. While he denies that he altered these documents
24 himself, movant has not produced any evidence to support his theory that they were altered by
25 anyone else. In addition, movant has not sustained his burden of showing that, in light of all the
26 evidence presented at trial, the outcome would have been different even if counsel had "noticed"
the alleged evidence tampering. It is entirely possible (and perhaps probable) that, had this issue
been raised in any greater detail by counsel, it would have been proved that movant himself

1 forged the documents. Thus, to the extent counsel did not pursue this issue, the decision
2 represents a tactical choice and not deficient performance.

3 5. Failure to Obtain Certification of Custody of Exhibits

4 Movant claims in his motion that counsel “failed to obtain certification of custody
5 of exhibits.” He does not, however, specify which exhibits were not accompanied by any
6 required certification.

7 6. Failure to Research

8 Movant claims that counsel failed to research the “60-day law” and, generally,
9 failed to research appropriate law. Assuming for the moment that counsel did in fact fail to
10 conduct some research, movant does not indicate how such research would have made a
11 difference to the outcome of the trial. Further, the record (and in particular trial briefs submitted
12 by movant’s counsel) reflects that counsel did in fact engage in lengthy and detailed research
13 sufficient to present the relevant issues to the court. As with many of movant’s other claims of
14 ineffective assistance of counsel, this claim is conclusory and vague.

15 7. Failure to Create Timeline

16 Movant claims that prosecution witnesses would have been impeached if the dates
17 of various events had been shown on a timeline. However, any timeline could not have changed
18 the underlying evidence, which the jury apparently chose not to see the way petitioner would
19 have liked. To the extent counsel chose not to present the dates in a timeline chart, the decision
20 must be seen as a tactical one and not the result of ineffective assistance.

21 8. Failure to Attack Government Evidence.

22 Movant claims that counsel failed to present or attack false evidence in
23 prosecution’s Exhibit 11 ‘summaries’ and a plethora of other false hearsay evidence presented by
24 the prosecution’s witnesses.” As to Exhibit 11, the record reveals that, contrary to movant’s
25 assertion, counsel did in fact challenge the evidence. Specifically, the exhibit was presented by
26 way of testimony from government witness Jerry Hurst, who was vigorously cross-examined by

1 defense counsel specifically regarding Exhibit 11. As to other allegedly “false hearsay
2 evidence,” movant does not specify which evidence is false.

3 9. Failure to Present Financial Records

4 Movant states that counsel failed to “present financial records.” As with many of
5 his other claims of ineffective assistance of counsel, the court agrees with respondent’s analysis:

6 . . . The petitioner fails to describe the records and does not explain
7 how their presentation would have affected the outcome of his case. He
has not met his burden and this claim must be denied.

8 10. Failure to Present “Mistakes” Defense Theory

9 Movant argues that counsel failed “to even consider a valid defense theory.”
10 However, because the record demonstrates that counsel did in fact argue various defense theories
11 at trial, to the extent he did not argue any particular theory movant would liked to have had
12 argued, the decision represents a tactical choice by counsel and cannot serve as the basis for a
13 claim of ineffective assistance.

14 11. Failure to Obtain Accomplice Instruction

15 Movant argues that counsel was ineffective for failing to obtain an instruction on
16 accomplice testimony. However, as respondent notes, counsel did in fact try to have such an
17 instruction read to the jury, but the trial judge refused. In particular, the defense’s proposed jury
18 instructions 18, 19, and 20 related to accomplice testimony.

19 12. Failure to Subpoena Martha Edwards

20 Movant claims that witness Martha Edwards was embezzling and that she should
21 have been subpoenaed by defense counsel. However, as respondent notes, movant “provides
22 nothing to substantiate these allegations and never explains how her testimony would have
23 affected the outcome of his case.”

24 ///

25 ///

26 ///

1 **B. Procedural Defaulted Claims**

2 A claim may not be raised by way of a motion under 28 U.S.C. § 2255 if the claim
3 was not first presented on direct appeal and where the movant deliberately by-passed direct
4 appeal or violated a specific rule requiring a particular claim to be raised at a certain time.
5 See Bousley v. United States, 523 U.S. 614 (1998); English v. Untied States, 42 F.3d 473, 481
6 (9th Cir. 1994); United States v. McMullen, 98 F.3d 1155, 1157 (9th Cir. 1996). If, however, the
7 movant can demonstrate cause and prejudice for the default or actual innocence the claim may be
8 heard. See Bousley, 523 U.S. at 622. Procedural default also does not apply to claims that could
9 not be presented on direct appeal because they required development of facts outside the record.
10 See Bousley, 614 U.S. at 621-22. Thus, procedural default does not apply to claims of
11 ineffective assistance of counsel because such claims are properly raised in the first instance in a
12 § 2255 motion. See United States v. Pirro, 104 F.3d 297, 299 (9th Cir. 1997).

13 Movant did not raise any of the claims presented in his § 2255 motion on direct
14 appeal. Therefore, the court agrees with respondent that all of movant's claims (except his
15 ineffective assistance of counsel claim) are subject to procedural default because they were not
16 raised on direct appeal. To avoid the default, movant must demonstrate cause and prejudice or
17 actual innocence. As to why he did not raise claims earlier, in his § 2255 motion movant states:

18 Defendant was represented by counsel throughout the pre, post,
19 trial and appellate proceedings. Defendant's counsel did not agree with
20 the defendant that the issues were critical to the immediate case. The
21 relationship between the defendant and counsel deteriorated ever since
22 counsel said "ready for trial" and counsel lacked needed discovery and had
not retained Medicare/Medi-Cal Billing Experts. Defendant could not
afford to hire counsel independent from the court appointed counsel and
requests to the public Defender's office for substitution were verbally
denied.

23 As discussed above, the court finds no basis for concluding that counsel was
24 ineffective in any regard. Therefore, ineffective assistance of counsel cannot provide cause and
25 prejudice to excuse movant's default of claims which could have been, but were not, raised on
26 direct appeal. Turning to actual innocence, movant does not present anything to this court

beyond conclusory and unsubstantiated arguments that the government's evidence was false and that he is not guilty of the crimes. The court finds that movant's claims of prosecutorial misconduct and trial court error are defaulted.

III. CONCLUSION

Based on the foregoing, the undersigned recommends that:

1. Movant's § 2255 motion (Doc. 194) be denied; and
2. All other pending motions (Docs. 195, 213, and 219) be denied as moot.

These findings and recommendations are submitted to the United States District Judge assigned to the case, pursuant to the provisions of 28 U.S.C. § 636(b)(1). Within 20 days after being served with these findings and recommendations, any party may file written objections with the court. The document should be captioned "Objections to Magistrate Judge's Findings and Recommendations." Failure to file objections within the specified time may waive the right to appeal. See Martinez v. Ylst, 951 F.2d 1153 (9th Cir. 1991).

DATED: April 4, 2008


CRAIG M. KELLISON
UNITED STATES MAGISTRATE JUDGE